

216333

**RICHARD R. WILSON, P.C.**

**Attorney at Law**

**A Professional Corporation**

**127 Lexington Avenue, Suite 100**

**Altoona, PA 16601**

(814) 944-5302

(888) 454-3817 (Toll Free)

(814) 944-6978 FAX

rrwilson@atlanticbnn.net

Of Counsel to:

Vuono & Gray LLC

2310 Grant Building

Pittsburgh, PA 15219

(412) 471-1800

(412) 471-4477 FAX

851 Twelfth Street  
Oakmont, PA 15139

April 18, 2006

Hon. Vernon A. Williams, Secretary  
Surface Transportation Board  
1925 K Street, NW  
Washington, DC 20423-0001



Re: Petition of Honey Creek Railroad, Inc. for Declaratory Order  
Finance Docket No. 34869

Dear Sir:

Enclosed for filing in the above captioned proceeding, please find the original and ten copies of Honey Creek Railroad, Inc.- Petition for Declaratory Order. Also enclosed is a check in the amount of \$1,400 in payment of the filing fee for this petition.

Please time stamp the additional copy of this letter and return it to the undersigned in the enclosed self addressed, stamped envelope. Copies of this Petition have been served on all parties of record.

Very truly yours,

RICHARD R. WILSON, P.C.

Richard R. Wilson, Esq.

Attorney for Honey Creek Railroad Company

**FILED**

APR 21 2006

**SURFACE  
TRANSPORTATION BOARD**

RRW/bab

Enclosures

xc: Honey Creek Railroad, Inc.  
All Parties of Record

ENTERED  
Office of Proceedings

APR 24 2006

Part of  
Public Record

**FEE RECEIVED**

APR 21 2006

**SURFACE  
TRANSPORTATION BOARD**

Before the  
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO: 34869

HONEY CREEK RAILROAD, INC. -  
PETITION FOR DECLARATORY ORDER



PETITION OF HONEY CREEK RAILROAD, INC.  
FOR DECLARATORY ORDER

**FILED**  
APR 21 2006  
SURFACE  
TRANSPORTATION BOARD

RICHARD R. WILSON, ESQ.  
Attorney for Honey Creek Railroad, Inc.  
Pa. I.D. #25661  
127 Lexington Avenue, Suite 100  
Altoona, PA 16601  
(814) 944-5302  
(814) 944-6978 fax

**FEE RECEIVED**  
APR 21 2006  
SURFACE  
TRANSPORTATION BOARD

Dated: April 18, 2006

ENTERED  
Office of Proceedings  
APR 24 2006  
Part of  
Public Record

Before the  
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO: 34869

HONEY CREEK RAILROAD, INC.  
PETITION FOR DECLARATORY ORDER



---

**PETITION OF HONEY CREEK RAILROAD, INC.  
FOR DECLARATORY ORDER**

---

A. INTRODUCTION

This Petition is filed by Honey Creek Railroad Company, Inc. ("HCR"), a Class III common carrier railroad whose line is subject to abandonment authorization in STB Docket No. AB-865X. HCR requests that the Board institute a Declaratory Order proceeding under 5 U.S.C. §554(e), 49 U.S.C. §721 and 49 C.F.R. Part 1117 pursuant to an order issued by the Circuit Court of Henry County, Indiana on March 30, 2006 in Case No. 33C01-0506-CT-0019, Honey Creek Railroad, Inc. v. Gary L. Roberts, et al., a copy of which is set forth as Exhibit A. Under this Order, the Circuit Court has referred the following question to the Surface Transportation Board:

Under the orders and decisions of the STB in STB Docket AB-865X, *Honey Creek Railroad, Inc. - Abandonment Exemption - in Henry County, Indiana*, did Honey Creek Railroad Company obtain and exercise in accordance with STB regulations abandonment authority so as to remove its railroad right of way and track materials placed thereon from the national rail transportation network and the jurisdiction of the STB and subject them to the claims of Defendants under Indiana law?

B. PROCEDURAL HISTORY

On June 22, 2005 after an exchange of correspondence between counsel, HCR filed an appearance, complaint and demand for jury trial and a notice for injunctive relief with the Henry County Circuit Court in New Castle, Indiana against Gary L. Roberts, et al.,

seeking a preliminary injunction and asserting claims for conversion of personal property belonging to HCR, malicious mischief, and a demand for damages. (Exhibit B)

On or about August 25, 2005 defendants filed an answer claiming that HCR's rail line was abandoned and asserted in subsequent pleadings that as a result of Plaintiff's "abandonment" of the railroad corridor and track materials, title to same had vested in the defendants and that plaintiff's claims were therefore without merit. (Exhibit C) HCR contends that the defendants' assertions are precluded by the decision of the Surface Transportation Board served August 20, 2004, as subsequently modified by Board decisions dated July 22, 2005 and February 3, 2006, which extended the date HCR must file its Notice of Consummation in STB Docket No. AB-865X to August 15, 2006 (Exhibit D)

Defendants claim that by virtue of the STB's abandonment authorization order of August 20, 2004 HCR abandoned its right of way and track materials and thereby relinquished all title to and ownership of them under Indiana law. Since factual and legal issues with respect to federal railroad abandonment proceedings fall within the exclusive jurisdiction of the STB, the Circuit Court of Henry County granted HCR's motion for referral to the Board to resolve the abandonment status of HCR's rail line. HCR requests that the Board review the proceedings in STB Docket No. AB-865X and render an advisory ruling to the Circuit Court of Henry County finding that HCR has yet to consummate the abandonment authorization issued by the Board in Docket No. AB-865X and as a consequence, HCR retains full possessory and/or ownership rights to the railroad right of way and all track materials on that right of way.

C. The HCR Rail Line Is Not Abandoned

Under well established federal law, until such time as a railroad company consummates STB abandonment authority, the rail line in question remains subject to the jurisdiction of the STB and part of the national rail transportation network. Baros v. Texas American Ry., 400 F3d 228(5<sup>th</sup> Cir. 2005). 49 C.F.R. §1152.29(e)(2). Furthermore, in the absence of a notice of consummation, the Board retains exclusive and preemptive jurisdiction over railroad rights of way and track materials thereon with respect to their use and disposition for railroad and nonrailroad purposes. 49 U.S.C. §10901-10905, Pittsburgh & Lake Erie Railway Company v. R.L.E.A., 491 U.S. 490, 498, 109 S. Ct. 2584, 2596 (1989).

As the Board is well aware, the abandonment authorization decision issued on August 20, 2004 by the STB in Docket No. AB-865-0-X is permissive only and requires that HCR comply with various directives and/or conditions imposed by the Board in its abandonment authorization order. Once these requirements have been complied with, the abandonment authorization order directs HCR to file a notice of consummation with the Board indicating its fulfillment of these requirements and its full compliance with the abandonment authorization order. Only then is the federal railroad abandonment process completed and the Board's exclusive preemptive jurisdiction over the subject rail line and the abandonment proceeding terminated. Hayfield N. R.R. v. Chicago & N.W. Transp., 467 U.S. 622 (1984)

HCR further requests that the Board construe and clarify the application of its rail abandonment regulations for purposes of Indiana Code §32-23-11-6 (a)(2) (Exhibit E). This state statutory rail abandonment provision requires that for a rail abandonment to be recognized under Indiana law, the STB must issue a certificate of public convenience and

necessity relieving the railroad of its common carrier obligations on the right of way. However, a common carrier railroad abandonment must be accomplished in accordance with federal law and a railroad is only relived of its common carrier obligation after the railroad has fully complied with the Board's abandonment regulations including the filing of a notice of consummation with the Board pursuant to 49 C.F.R. §1152.29(e)(2). I.C. §32-23-11-6 (a)(2) must be applied in a manner consistent with federal railroad abandonment procedures and may only be construed in a manner which fully recognizes those federal regulatory procedures. Accordingly, before a railroad abandonment can be recognized for purposes of Indiana law, I.C. §32-23-11-6(a)(2) requires full compliance by the railroad with STB abandonment procedures, including compliance with all STB imposed conditions and the filing of a notice of consummation.

In AB-865X, HCR obtained STB abandonment authorization but prior to consummation of that abandonment authorization, track materials were improperly removed from its right of way by defendants without authorization by HCR. Since no notice of consummation had been filed and other conditions imposed by the Board have not yet been completed, HCR's rail line was not and is not abandoned for purposes of 49 U.S.C. §10905 or I.C. §32-23-11-6(a)(2) and remains subject to the preemptive federal jurisdiction of the STB under 49 U.S.C. §10501(b).

#### D. CONCLUSION


WHEREFORE, HCR respectfully requests that the Board issue a declaratory order confirming (1) that HCR has not yet fully consummated its STB abandonment authorization, (2) that its track materials and right of way have not been abandoned for purposes of I.C. §32-23-11-6(a)(2), (3) that HCR retains full possessory rights of ownership and/or control of its railroad right of way and all railroad tracks, ties and other

track material located on its right of way, and (4) that any state law claims or defenses which may be asserted by defendants that interfere with or preclude HCR's disposition or control of its railroad assets under the abandonment authorization issued by the STB are preempted by federal law until such time as HCR files a notice of abandonment consummation with the Board.

Respectfully submitted,

RICHARD R. WILSON, P.C.

By:

  
Richard R. Wilson, Esq.  
Attorney for Honey Creek Railroad, Inc.

RICHARD R. WILSON, P.C.  
127 Lexington Avenue, Suite 100  
Altoona, PA 16601  
(814) 944-5302

# BROOKE ♦ MAWHORR

*Attorneys At Law*

John H. Brooke  
Douglas K. Mawhorr

Leslie M. Horn

June 10, 2005

JUN 14 2005

William Keaton  
Keaton and Keaton, P. C.  
126 West Second Street  
Rushville, Indiana 46173

Re: Gary Roberts / Honey Creek Railroad

Dear Mr. Keaton:

I have had an opportunity to review your May 25, 2005 correspondence with my client. My client strongly disputes the allegations that he has removed, destroyed rails and rail equipment belonging to your client. In your letter dated May 25, 2005 you failed to identify the interest in the real estate where these rails are located other than describing it was a "right-of-way".

Since a preliminary search of the property records indicates no easement or other proper legal title for the Honey Creek Railroad or its predecessors, my client owns the real estate and owns all aspects of the real estate and improvements there on which have been abandoned. The Honey Creek rail line that crosses through my client's property was legally abandoned by the Surface Transportation Department of the United States Department of Transportation in August 2004. We have obtained the proper documentation from the Department of Transportation to verify the abandonment.

Furthermore the Norfolk and Southern Railroad has removed rails, ties and other aspects of the "Honey Creek Railroad property" making access to the Norfolk and Southern line impossible. My client puts no weight in the fact that the Honey Creek Railroad is "inactive" giving its legal and physical attributes which clearly indicate an abandonment.

The Honey Creek Railroad has done nothing to operate its railroad for the past several years and there is no ability to operate the railroad in the future since it has been abandoned.

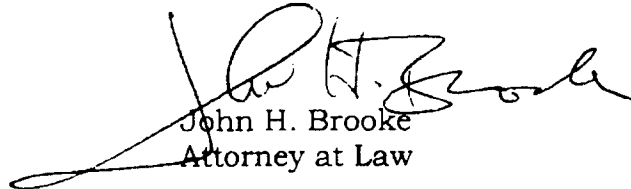


William Keaton  
Keaton and Keaton, P. C.  
Page Two  
June 10, 2005

My client therefore has a right to use his property without interference from the Honey Creek Railroad. If there are any other questions please don't hesitate to contact me. Please be advised that this office will not accept service of process for any of the defendants herein.

Sincerely,

BROOKE ♦ MAWHORR, PC



John H. Brooke  
Attorney at Law

JHB/llr

**RICHARD R. WILSON, P.C.**

**Attorney at Law**

**A Professional Corporation**

**127 Lexington Avenue, Suite 100**

**Altoona, PA 16601**

(814) 944-5302

(888) 454-3817 (Toll Free)

(814) 944-6978 FAX

rrwilson@atlanticbbn.net

Of Counsel to:

Vuono & Gray LLC

2310 Grant Building

Pittsburgh, PA 15219

(412) 471-1800

(412) 471-4477 FAX

851 Twelfth Street  
Oakmont, PA 15139

June 17, 2005

John H. Brooke, Esq.  
Brooke-Mawhorr  
P.O. Box 1071  
112 East Gilbert St.  
Muncy, IN 47308-1071

SENT VIA FACSIMILE – 765-288-7763

Re: Honey Creek Railroad Abandonment Status

Dear Mr. Brooke:

I am in receipt of your letter of June 10, 2005 to Attorney William Keaton. I am the attorney who represented Honey Creek Railroad in connection with its abandonment application before the Surface Transportation Board. I have been advised that your client, Gary Roberts, has destroyed and removed rails and other track materials from the Honey Creek Railroad right of way under the belief that this railroad right of way has been fully abandoned and that portions of this right of way adjacent to his property and all improvements thereon have reverted to him. I have also reviewed the assertions set forth in your letter of June 10, 2005 and I wish to inform you and your client that your legal analysis and understanding of the facts regarding this railroad right of way are seriously in error.

As you will note from the enclosed pleading index for the Honey Creek Railroad Abandonment in AB-865-0-X which is publicly available on the Surface Transportation Board website, the Honey Creek Railroad filed a Notice of Exemption to obtain abandonment authority from the Surface Transportation Board on August 2, 2004. On August 20, 2004, the Surface Transportation Board issued a Notice of Exemption authorizing Honey Creek Railroad to abandon its entire 5.9 mile line of railroad between Sulphur Springs and New Castle, Indiana in Henry County, Indiana (copy attached). However, if you will note carefully on Page 3 of that decision, Honey Creek Railroad was directed to file a Notice of Consummation with the Board to signify when it had exercised the authority granted by the Board and fully abandoned the line in accordance with 49 C.F.R. §1152.29(e)(2). Furthermore, on September 16, 2004 the Board issued a supplemental order imposing a Notice of Interim Trail Use with respect to this rail line and further conditioning its abandonment authority on compliance with certain environmental

Page Two  
June 17, 2005

conditions related to removal of track at certain locations along the rail line (copy attached). As you can see from the pleadings index, Honey Creek Railroad Company has yet to file a Notice of Consummation with the Surface Transportation Board for this rail line in accordance with 49 C.F.R. §1152.29(e)(2) and accordingly, the 5.9 mile rail line of Honey Creek Railroad has not yet been abandoned under the Board's August 20, 2004 authorization order.

Both administrative and judicial decisions confirm that when a carrier is authorized to abandon a rail line, that authority is permissive, not mandatory. Thus, until the carrier exercises abandonment authority it has received under the provisions of 49 C.F.R. §1152.29(e)(2), the rail line is not abandoned and the Board's primary jurisdiction over the rail line continues. Thus, federal law controls the status of the rail line as a nonabandoned rail facility and the application of state personal and real property law with respect to the rail line is preempted. See Almono LP – Abandonment Exemption in Allegheny County, PA, STB Docket No. AB-842X January 28, 2004; Brit v. Surface Transportation Board, 90 F.3d 580 (1996). Charles Barows, et al. v. Texas Mexican Railway Company, 400 F.3d 228, 205 U.S. App. Lexis 2004 195 (February 9, 2005).

Accordingly, your client has no authority whatsoever to trespass upon the Honey Creek Railroad Company right of way or to remove any personal property including rails, ties, ballast or other rail facilities which are the sole and exclusive property of Honey Creek Railroad Company. I strongly suggest that you counsel your client to return any property which he has taken and/or removed from the Honey Creek Railroad right of way and to cease and desist from all further trespass upon the Honey Creek Railroad right of way.

Thank you for your immediate attention to this matter. If you have any further questions in this regard, please contact me.

Very truly yours,

RICHARD R. WILSON, P.C.



Richard R. Wilson, Esq.  
Attorney for Honey Creek Railroad Co.

/39614

RRW/bab

Enclosures

xc: William B. Keaton, Esq. (by facsimile 765-938-2803)  
William E. Smith (by facsimile 765-938-5558)

STATE OF INDIANA, )  
) SS: IN THE HENRY CIRCUIT COURT  
COUNTY OF HENRY, )

NO. 33CO1-0506-CT-0019

HONEY CREEK RAILROAD, INC., )  
Plaintiff, )  
VS. )  
GARY L. ROBERTS, Individually, )  
ROBERTS PIPELINE CONSTRUCTION )  
COMPANY, INC., An Indiana Corporation )  
and ROBERTS CONSTRUCTION, INC., )  
An Indiana Corporation, )  
Defendants, )

**FILED**

MAR 30 2006

*William B. Keaton*  
CLERK HENRY CIRCUIT COURT

**ORDER OF COURT**

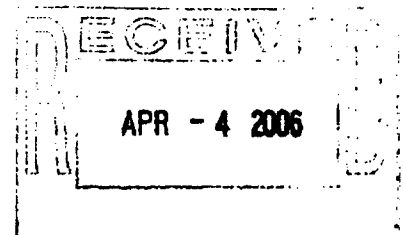
And now this 30th day of March, 2006, upon consideration of Plaintiff's Petition For Order Of Referral to the Surface Transportation Board and Defendants' response thereto, Plaintiff is directed to file a Petition For Declaratory Order with the Surface Transportation Board with respect to the following question:

Under the orders and decisions of the STB in STB Finance Docket AB-865X, *Honey Creek Railroad, Inc. - Abandonment Exemption - in Henry County, Indiana*, did Honey Creek Railroad Company obtain and exercise in accordance with STB regulations abandonment authority so as to remove its railroad right of way and track materials placed thereon from the national rail transportation network and the jurisdiction of the STB and subject them to the claims of the Defendants under Indiana law?

All proceedings in this matter are stayed pending the STB's determination of the foregoing question.

*Jay L. Toney*  
Hon. Jay L. Toney  
Special Judge, Henry Circuit Court

DISTRIBUTION:  
William B. Keaton  
John H. Brooke  
Richard R. Wilson  
Surface Transportation Board  
(Certified Mail #7160 3901 9848 4202 8419)



STATE OF INDIANA, )  
 ) SS: IN THE CIRCUIT/SUPERIOR COURT OF HENRY COUNTY  
COUNTY OF HENRY, )  
NO. 33C01- 0 5 0 6 CT 0019

HONEY CREEK RAILROAD, INC., )  
an Indiana Corporation, )  
Plaintiff, )  
VS. )  
GARY L. ROBERTS, )  
Defendant, )

**FILED**

JUN 20 2005

*Shirley A. Smith*  
CLERK HENRY CIRCUIT COURT

APPEARANCE

Comes now Keaton and Keaton, P.C., by William B. Keaton, and enters his appearance on behalf of Honey Creek Railroad, Inc. in this cause.

1. Initiating Party: Honey Creek Railroad, Inc.
2. Attorney for Initiating Party: William B. Keaton, #5102-70  
Keaton and Keaton, P.C.  
126 West Second Street  
Rushville, IN 46173  
Telephone: (765)932-3947  
FAX: (765)938-2803
3. Type of Proceeding: CT Complaint for Conversion and Permanent Injunction
4. Keaton and Keaton, P.C. will NOT accept service by FAX.

KEATON AND KEATON, P.C.

By *William B. Keaton*  
William B. Keaton, #5102-70  
Attorney for Plaintiff

KEATON AND KEATON, P.C.  
126 West Second Street  
Rushville, Indiana 46173  
Telephone: (765)932-3947  
HoneyCreekAppear.jun\vim

STATE OF INDIANA,           )  
  ) SS: IN THE CIRCUIT/SUPERIOR COURT OF HENRY COUNTY  
COUNTY OF HENRY,        )

NO. 33C01-0506 CT 0019

HONEY CREEK RAILROAD, INC.,    )  
an Indiana Corporation,        )

Plaintiff,                    )

VS.                                )

GARY L. ROBERTS,                )

Defendant,                    )

**FILED**

JUN 20 2005

*Thomas H. Smith*  
CLERK HENRY CIRCUIT COURT

**VERIFIED COMPLAINT**

Comes now Honey Creek Railroad, Inc. (hereinafter referred to as "Honey Creek") by its President, William E. Smith, and for the Verified Complaint of Honey Creek against Gary L. Roberts (hereinafter referred to as "Roberts") would show the Court as follows:

**General Allegations**

1. Honey Creek is a corporation organized pursuant to the laws of the State of Indiana.
2. Honey Creek is in good standing with the office of the Secretary of State of the State of Indiana.
3. Honey Creek is the owner of a railroad located in Henry County, Indiana, consisting of the right of use of certain property, a railroad bed, railroad ties, spikes, rails and switches (hereinafter referred to as "railroad").
4. Honey Creek has the sole right to the use and possession of the railroad.
5. Honey Creek is the owner of the personal property consisting of the rails, switches, spikes, ties and material making up the railroad bed.
6. Roberts is believed to own property adjoining the railroad in Henry County, Indiana.

7. Roberts has removed and destroyed rails, ties, spikes and severely damaged the railroad bed owned by Honey Creek.
8. Roberts has cut up and destroyed number one relay rails owned by Honey Creek, tremendously reducing their value from number one relay rail to scrap iron.
9. Roberts has cut up and destroyed a railroad switch owned by Honey Creek.
10. Roberts continues to threaten to destroy additional property of Honey Creek.
11. Roberts is believed to be in the process of and attempting to sell the property of Honey Creek.

**I.**

**Request For Emergency Preliminary Injunction**

12. An emergency preliminary injunction should be entered pursuant to Trial Rule 65(A)(1) enjoining Roberts from damaging any additional portions of the railroad and enjoining him from disposing of any of the property which he has removed from the railroad.
13. Roberts is represented by John H. Brooke, Esq., P. O. Box 1071, Muncie, Indiana 47308-1071, and a copy of this Complaint has been sent to him by facsimile to provide notice of our request for an emergency preliminary injunction.
14. Unless an immediate emergency hearing is held, irreparable injury, loss or damage will result to Honey Creek as the result of Roberts' continued destruction of Honey Creek's railroad.

WHEREFORE, Honey Creek prays the Court to set this matter on an emergency basis for hearing on a preliminary injunction, to issue a preliminary injunction enjoining Roberts from continuing to destroy Honey Creek's property and from disposing of any property that has already been removed from the railroad pending a determination of the issues in this case and for all other relief proper in the premises.

**III.**  
**Conversion**

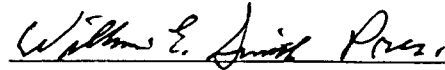
Comes now Honey Creek Railroad, Inc. by its President, William E. Smith, and for its Complaint against Gary L. Roberts for Conversion would show as follows:

17. Honey Creek incorporates by reference rhetorical paragraphs 1 through 11 of the General Allegations as though fully set forth herein.
18. Roberts removed and destroyed for his own gain property of Honey Creek resulting in a pecuniary loss to Honey Creek.
19. Roberts knowingly or intentionally exerted unauthorized control over the property of Honey Creek.
20. Roberts' actions constitute a violation of Ind. Code § 35-43-4-3.
21. As the direct result of Roberts' actions and violation of I.C. § 35-43-4-3, Honey Creek has suffered a pecuniary loss which is estimated to be in significantly excess of One Hundred Thousand Dollars (\$100,000.00) and continues to increase due to Roberts' continued destruction of the railroad.
22. Honey Creek is entitled to recover all of the damages set forth in I.C. § 34-24-3-1 including, but not limited to, an amount up to three (3) times the actual damages, the costs of the action, reasonable attorney fees, actual expenses incurred in bringing this action and all other costs and damages set forth in said statute.

WHEREFORE, Honey Creek prays the Court or jury to grant judgment in favor of Honey Creek on its Complaint for Conversion for three (3) times the pecuniary loss suffered by Honey Creek; to grant Honey Creek the additional damages provided by statute; for reasonable attorney fees and expenses and for all other relief proper in the premises.



I affirm under the penalties for perjury that the foregoing statements are true and correct to the best of my knowledge and belief.

 Pres.

William E. Smith, President  
Honey Creek Railroad, Inc.

## II.


### Complaint For Permanent Injunction

Comes now Honey Creek Railroad, Inc. by its President, William E. Smith, and for its Complaint For Permanent Injunction against Gary L. Roberts would show as follows:

15. Honey Creek incorporates by reference rhetorical paragraphs 1 through 11 of the General Allegations and rhetorical paragraphs 12 through 14 of Legal Paragraph I of the Complaint.
16. A permanent injunction should be entered to enjoin Roberts from engaging in any future conduct to damage, destroy or in any way exercise unauthorized control over the property of Honey Creek's railroad.

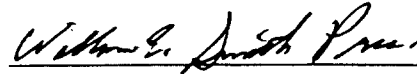
WHEREFORE, Honey Creek prays for a permanent injunction as requested herein and for all other relief proper in the premises.

I affirm under the penalties for perjury that the foregoing statements are true and correct to the best of my knowledge and belief.

 Pres.

William E. Smith, President  
Honey Creek Railroad, Inc.

I affirm under the penalties for perjury that the foregoing statements are true and correct to the best of my knowledge and belief.



William E. Smith, President  
Honey Creek Railroad, Inc.

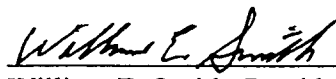
**IV.**  
**Mischief**

23. Honey Creek incorporates by reference rhetorical paragraphs 1 through 11 of the General Allegations and paragraphs 17 through 23 of Legal Paragraph III as though fully set forth herein.
24. Roberts recklessly, knowingly, or intentionally damaged or defaced the property of Honey Creek without Honey Creek's consent.
25. The pecuniary loss was in excess of One Hundred Thousand Dollars (\$100,000.00).
26. Roberts' acts are a violation of Ind. Code § 35-43-1-2.
27. As the direct result of Roberts' actions and violation of I.C. § 35-43-1-2, Honey Creek has suffered a pecuniary loss which is estimated to be in significantly excess of One Hundred Thousand Dollars (\$100,000.00) and continues to increase due to Roberts' continued destruction of the railroad.
28. Honey Creek is entitled to recover all of the damages set forth in I.C. § 34-24-3-1 including, but not limited to, an amount up to three (3) times the actual damages, the costs of the action, reasonable attorney fees, actual expenses incurred in bringing this action and all other costs and damages set forth in said statute.

WHEREFORE, Honey Creek prays the Court or jury to grant judgment in favor of Honey Creek on its Complaint for Conversion for three (3) times the pecuniary loss suffered by Honey

Creek; to grant Honey Creek the additional damages provided by statute; for reasonable attorney fees and expenses and for all other relief proper in the premises.

I affirm under the penalties for perjury that the foregoing statements are true and correct to the best of my knowledge and belief.

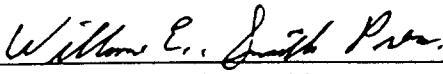
  
\_\_\_\_\_  
William E. Smith, President  
Honey Creek Railroad, Inc.

V.  
Damages

29. Honey Creek incorporates by reference rhetorical paragraphs 1 through 11 of the General Allegations, paragraphs 17 through 23 of legal paragraph III and paragraphs 23 through 24 of Legal Paragraph IV as though fully set forth herein.
30. Roberts negligently and without authority damaged the railroad of Honey Creek.
31. Honey Creek demanded that Roberts cease and desist in his damage to Honey Creek's railroad, but he refused to do so.
32. Honey Creek is without fault.
33. As the direct and proximate result of the negligent acts of the defendant, Honey Creek has been damaged. The amount of the damage has not yet been determined, but it is believed to be far in excess of One Hundred Thousand Dollars (\$100,000.00).

WHEREFORE, Honey Creek prays the Court or jury to grant judgment in favor of Honey Creek on its Complaint for Damages; and for all other relief proper in the premises.

I affirm under the penalties for perjury that the foregoing statements are true and correct to the best of my knowledge and belief.



William E. Smith, President  
Honey Creek Railroad, Inc.



William B. Keaton, #5102-70  
Attorney for Honey Creek Railroad, Inc.

KEATON AND KEATON, P.C.  
126 West Second Street  
Rushville, Indiana 46173  
Telephone: (765)932-3947  
Fax: (765) 938-2803

STATE OF INDIANA,           )  
  ) SS: IN THE CIRCUIT/SUPERIOR COURT OF HENRY COUNTY  
COUNTY OF HENRY,        )

NO. 33C01-0506 CT 0019

HONEY CREEK RAILROAD, INC.,        )  
an Indiana Corporation,            )  
  ) Plaintiff,            )  
  ) VS.                    )  
  )                    )  
GARY L. ROBERTS,                    )  
  ) Defendant,          )

**FILED**

JUN 20 2005

*John A. Smith*  
CLERK HENRY CIRCUIT COURT

**DEMAND FOR JURY TRIAL**  
**ON LEGAL PARAGRAPH III, IV And V**

Comes now the plaintiff, Honey Creek Railroad, Inc., by counsel, William B. Keaton, and hereby requests a trial by jury on Legal Paragraphs III, IV and V of the Complaint in this cause.

**WHEREFORE**, William B. Keaton prays the Court for a trial by jury on Legal Paragraphs III, IV and V of the Complaint in this cause and for all other relief proper in the premises.

KEATON AND KEATON, P.C.

By *William B. Keaton*  
William B. Keaton, #5102-70  
Attorney for Plaintiff

KEATON AND KEATON, P.C.  
126 West Second Street  
Rushville, Indiana 46173  
Telephone: (765)932-3947

HoneyCreekJury.jun\rlm

STATE OF INDIANA, )  
 ) SS: IN THE CIRCUIT/SUPERIOR COURT OF HENRY COUNTY  
COUNTY OF HENRY, )

NO. 33C01-0506 CT0019

HONEY CREEK RAILROAD, INC., )  
an Indiana Corporation, )  
Plaintiff, )  
VS. )  
GARY L. ROBERTS, )  
Defendant, )

**FILED**

JUN 20 2005

*Stephen H. French*  
CLERK HENRY CIRCUIT COURT

**NOTICE OF HEARING ON REQUEST**  
**FOR IMMEDIATE PRELIMINARY INJUNCTION**

Notice is hereby given that a hearing will be conducted in this cause on the 19 day of July, 2005, at 2:00 o'clock p.m. on plaintiff's request for an immediate preliminary injunction.

This hearing will take approximately two (2) hours.

**ALL OF WHICH IS ORDERED** this 20 day of June, 2005.

*Mr. J. L. Keaton*  
\_\_\_\_\_  
Judge, Henry Superior/Circuit Court

DISTRIBUTION:  
William B. Keaton  
Fax: (765) 938-2803

John H. Brooke  
P. O. Box 1071  
Muncie, Indiana 47308-1071  
Fax: (765) 288-7763

**Personal Service by Henry County**  
**Sheriff on:**  
Gary L. Roberts  
Roberts Pipeline Construction Co., Inc.  
State Road 36 and CR 200 West  
Sulphur Springs, Indiana 47338

STATE OF INDIANA            )     IN THE HENRY CIRCUIT COURT  
                                   )SS:  
 COUNTY OF HENRY            )     CAUSE NO: 33C01-0506-CT-0019

HONEY CREEK RAILROAD, INC.,                    )  
 An Indiana Corporation,                        )  
                                   Plaintiff,                        )  
                                   vs.                                        )  
 GARY L. ROBERTS,                                )  
 Individually,                                    )  
 ROBERTS PIPELINE CONSTRUCTION                )  
 COMPANY, INC.,                                 )  
 An Indiana Corporation,                        )  
 ROBERTS CONSTRUCTION, INC.,                 )  
 An Indiana Corporation,                        )  
                                   Defendants.                        )

**DEFENDANT'S RESPONSE TO PLAINTIFF'S PETITION  
 FOR ORDER OF REFERRAL TO THE SURFACE TRANSPORTATION BOARD**

Come now, Defendants, Gary Roberts, Roberts Pipeline Construction Company, Inc., and Roberts Construction, Inc., ("Roberts") by counsel, John H. Brooke, BROOKE MAWHORR, P.C., and submit this Response to Plaintiff's Petition for Order of Referral to the Surface Transportation Board.

I.     Introduction

Plaintiff, Honey Creek Railroad, Inc., ("HCR") filed its Complaint on June 22, 2005, in Henry County Circuit Court, New Castle, Indiana, followed by the filing of an Amended Complaint on June 27, 2005. HCR's Complaint sets forth counts for an emergency preliminary injunction, conversion of personal property belonging to HCR, malicious mischief, and a demand for damages.

Roberts filed his answer, asserting that, due to HCR's abandonment of the railroad corridor and track materials, any easement which may have been granted to HCR had reverted back to him as the landowner.

On October 28, 2005, HCR filed a Petition for Order of Referral for the Surface Transportation Board, which this Court set to be heard on February 8, 2006.

## II. Statement of Facts

HCR filed a notice of exemption to abandon its entire line of railroad between Sulphur Springs and New Castle in Henry County, Indiana, on August 2, 2004. The Surface Transportation Board issued an order dated August 20, 2004, indicating that an exemption to abandon the railway would go into effect on September 21, 2004, unless requests for stays were received. STB Docket NO. AB-865-X. Honey Creek Railroad, Inc. Abandonment Exemption in Henry County, Indiana. A Request for Public Use Condition and Request for Interim Trail Use was filed by Indiana Trails Fund, Inc., which granted a one hundred eighty-day window for negotiations between that organization and HCR for the possible use of the railway for public recreation. That time period expired on March 20, 2005.

This railway has been unusable for approximately fifteen (15) years, as portions of track have been either paved over or removed. (See photos attached to this memorandum as exhibit 1.) HCR asserts unauthorized trespass of Roberts upon HCR property, and the unlawful taking, conversion and removal of railroad track materials from the property of HCR. Roberts asserts that the combination of HCR's notice of exemption to abandon its entire line of railroad, coupled with its constructive consent to removal or paving over of other portions of track, comprises abandonment as a matter of law, or in the alternative, constructive abandonment, thereby causing a vesting of the railroad's interest in Roberts, the owner of the rights-of-way at issue here, pursuant to I.C. §32-23-11-10.



### III. Argument

The issues in this case should be decided in Indiana Court, pursuant to Indiana law. The Indiana Supreme Court decided issues very similar to the ones presented in the present case in *Conrail v. Lewellen*, 682 N.E. 2d 779 (Ind. Sup. Ct. 1997). In *Lewellen*, although the Interstate Commerce Commission (now Surface Transportation Board) had issued Conrail a certificate of abandonment prior to removal of tracks and other materials, the Court held that the Indiana Statute then in effect, Ind. Code 8-4-35-4 (current version at Ind. Code §32-23-11-6) which delineated when a railroad had abandoned its right-of-way, was determinative in this case, and awarded the rights-of-way to the owners, declaring Conrail to have abandoned the land as a matter of law. *Id* at 783.

HCR was issued the authority to abandon by the STB, subject to conditions which have, for the most part, expired. More importantly, HCR did nothing to prevent the paving over and/or removal of portions of its track by state and county authorities, rendering the entire track unusable for the past fifteen years. By consenting to this activity through lack of response, HCR has constructively abandoned any right of way interest it may have had at one time. Additionally, Roberts contends that Ind. Code § 32-23-11-6 (2) is satisfied because (1) the STB issued the necessary exemption, although conditional, and (2) rails, switches, ties, and other facilities were removed from the right-of-way years ago making it unusable for rail traffic.

The cases cited in Plaintiff's Legal Memorandum in Support of Petition for Order of Referral to the Surface Transportation Board for its proposition that this matter must be referred to the STB under the doctrine of primary jurisdiction as well as its exclusive

statutory jurisdiction over railroad abandonments were decided prior to the Indiana Supreme Court's 1997 decision in *Conrail v. Lewellen*. However, the Indiana Supreme Court did not find that any of the three factors (cited in *Pejepscot Industrial Park v. Maine Central R.R. Co.*, 215 F.3d 195, 205) relevant to whether the primary jurisdiction doctrine requires referral to the STB were present in *Lewellen*, nor are they present in this case. The issues presented in this case can be properly addressed by Indiana Courts.

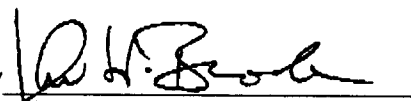
#### IV. Conclusion

For the reasons set forth herein, Defendants, Gary Roberts, Roberts Pipeline Construction Company, Inc., and Roberts Construction, Inc., respectfully request that this Court deny Plaintiff's Petition for Order of Referral to the Surface Transportation Board and all other relief just and proper in the premises.

Respectfully submitted,

BROOKE MAWHORR, P.C.

By



John H. Brooke, #4234-18

Attorney for Defendants

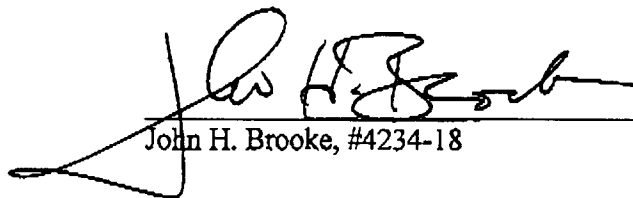
BROOKE MAWHORR, P.C.  
112 East Gilbert Street  
P.O. Box 1071  
Muncie, IN 47308  
(765) 741-1375

### CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a copy of the foregoing complaint was served upon those listed below via fax and/or first class mail, U.S. postage prepaid, on or before the date of filing.

William B. Keaton  
KEATON AND KEATON, P.C.  
126 West Second Street  
Rushville, Indiana 46173

Mr. Richard R. Wilson  
Richard R. Wilson, PC  
127 Lexington Ave., Suite 100  
Altoona, PA 16601



John H. Brooke, #4234-18

LAW OFFICES OF

**BROOKE MAWHORR, P.C.**

112 EAST GILBERT STREET

P.O. BOX 1071

MUNCIE, INDIANA 47308

Telephones (765) 741-1375 and (800) 481-0900

Facsimile (765) 288-7763

John H. Brooke  
Douglas K. Mawhorr

---

Leslie M. Horn

**FACSIMILE COVER PAGE**

February 7, 2006

TO: Richard R. Wilson

FAX: 814-944-6978

FROM: John H. Brooke, Brooke Mawhorr, P. C.

RE: Honey Creek Railroad v. Roberts  
Cause No.: 33C01-0506-CT-0019

PAGES (including cover page): 6

Original to follow in U.S. mail ☐ Yes ☒ No

This transmission is privileged communication between these attorneys and their clients. All contents of any documents transmitted with this cover sheet are also privileged communication between attorneys and their clients. Any retransmission or reproduction without authorization is strictly prohibited. If you receive this transmission in error, then you must contact the law office immediately and destroy all copies. ANY VIOLATION OF THESE CONDITIONS MAY RESULT IN CRIMINAL AND/OR CIVIL PROSECUTION.

**COMMENTS:**

Operator: llr

36709  
DO

SERVICE DATE – FEBRUARY 6, 2006

SURFACE TRANSPORTATION BOARD

DECISION

STB Docket No. AB-865X

HONEY CREEK RAILROAD, INC.–ABANDONMENT EXEMPTION–  
IN HENRY COUNTY, IN

Decided: February 3, 2006

The Honey Creek Railroad, Inc. (HCR) filed a notice of exemption under 49 CFR 1152 Subpart F–Exempt Abandonments to abandon its entire approximately 5.9-mile line of railroad, between Sulphur Springs and New Castle, in Henry County, IN. Notice of the exemption was served and published in the Federal Register on August 20, 2004 (69 FR 51751). In the August 20 notice, the Board stated that, if consummation had not been effected by HCR's filing of a notice of consummation by August 20, 2005, and there were no legal or regulatory barriers to consummation, the authority to abandon would automatically expire.

By decision and notice of interim trail use or abandonment (NITU) served on September 20, 2004, the proceeding was reopened and a 180-day period was authorized for the Indiana Trails Fund, Inc. (ITF), to negotiate an interim trail use/rail banking agreement with HCR for the entire line pursuant to the National Trails System Act, 16 U.S.C. 1247(d) (Trails Act).<sup>1</sup> The trail use negotiating period expired on March 20, 2005.

By decision served on July 22, 2005, the due date for filing a notice of consummation was extended to February 16, 2006.

On January 30, 2006, HCR filed a request to further extend for 180 days (until August 15, 2006) the time to file its notice of consummation. HCR states that the additional time is needed so that the legal issues presented in its litigation pending in the Henry County Circuit Court can be properly resolved. HCR also maintains that the extension will afford the parties and the court an adequate period of time in which to obtain from the Board whatever advisory guidance the court determines is appropriate and to resolve the litigation currently pending before it.

Under 49 CFR 1152.29(e)(2), a railroad may, for good cause shown, file a request for an extension of time to file a notice of consummation in abandonment proceedings. Good cause has been shown and the deadline for filing the notice of consummation will accordingly be extended to August 15, 2006.

---

<sup>1</sup> The September 20, 2004 decision also imposed a public use condition, which expired on March 20, 2005, and several environmental conditions, which remain in effect.

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. HCR's request for an extension of time to file a notice of consummation is granted.
2. The authority to abandon must be exercised, and the notice of consummation must be filed, on or before August 15, 2006.
3. This decision is effective on its service date.

By the Board, David M. Konschnik, Director, Office of Proceedings.

Vernon A. Williams  
Secretary

36036  
DO

SERVICE DATE – JULY 22, 2005

SURFACE TRANSPORTATION BOARD

DECISION

STB Docket No. AB-865X

HONEY CREEK RAILROAD, INC.–ABANDONMENT EXEMPTION–  
IN HENRY COUNTY, IN

Decided: July 20, 2005

The Honey Creek Railroad, Inc. (HCR) filed a notice of exemption under 49 CFR 1152 Subpart F–Exempt Abandonments to abandon its entire approximately 5.9-mile line of railroad, between Sulphur Springs and New Castle, in Henry County, IN. Notice of the exemption was served and published in the Federal Register on August 20, 2004 (69 FR 51751). In the August 20 notice, the Board stated that, if consummation has not been effected by HCR's filing of a notice of consummation by August 20, 2005, and there are no legal or regulatory barriers to consummation, the authority to abandon will automatically expire.

By decision and notice of interim trail use or abandonment (NITU) served September 20, 2004, the proceeding was reopened and a 180-day period was authorized for the Indiana Trails Fund, Inc. (ITF), to negotiate an interim trail use/rail banking agreement with HCR for the entire line pursuant to the National Trails System Act, 16 U.S.C. 1247(d) (Trails Act).<sup>1</sup> The trail use negotiating period expired on March 20, 2005.

On July 11, 2005, HCR filed a request to extend for 180 days (until February 16, 2006), the time to file its notice of consummation. HCR states that the additional time is needed so that the legal issues presented in its litigation pending in the Henry County Circuit Court involving an adjoining landowner can be properly resolved. HCR also states that the extension will afford both parties a fair and adequate opportunity to present their respective claims to the court.

Under 49 CFR 1152.29(e)(2), a railroad may, for good cause shown, file a request for an extension of time to file a notice of consummation in abandonment proceedings. Good cause has been shown and the deadline for filing the notice of consummation will accordingly be extended to February 16, 2006.

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

---

<sup>1</sup> The September 20, 2004 decision also imposed a public use condition, which expired on March 20, 2005, and several environmental conditions, which remain in effect.

It is ordered:

1. HCR's request for an extension of time to file a notice of consummation is granted.
2. The authority to abandon must be exercised, and the notice of consummation must be filed, on or before February 16, 2006.
3. This decision is effective on its service date.

By the Board, David M. Konschnik, Director, Office of Proceedings.

Vernon A. Williams  
Secretary



34964

SERVICE DATE - AUGUST 20, 2004

DO

FR-4915-01-P

DEPARTMENT OF TRANSPORTATION

Surface Transportation Board

[STB Docket No. AB-865X]

Honey Creek Railroad, Inc.—Abandonment Exemption—in Henry County, IN

The Honey Creek Railroad, Inc. (HCR) has filed a notice of exemption under 49 CFR 1152 Subpart F—Exempt Abandonments to abandon its entire approximately 5.9-mile line of railroad, between Sulphur Springs and New Castle, in Henry County, IN.<sup>1</sup> The line traverses United States Postal Service Zip Code 47362.

HCR has certified that: (1) no local traffic has moved over the line for at least 2 years; (2) there is no overhead traffic on the line; (3) no formal complaint filed by a user of rail service on the line (or by a state or local government entity acting on behalf of such user) regarding cessation of service over the line either is pending with the Board or with any U.S. District Court or has been decided in favor of complainant within the 2-year period; and (4) the requirements at 49 CFR 1105.7 (environmental reports), 49 CFR 1105.8 (historic reports), 49 CFR 1105.11 (transmittal letter), 49 CFR 1105.12 (newspaper publication), and 49 CFR 1152.50(d)(1) (notice to governmental agencies) have been met.

---

<sup>1</sup> HCR acquired the line in Honey Creek Railroad, Inc.—Acquisition and Operation Exemption—Line of Consolidated Rail Corporation, Finance Docket No. 32332 (ICC served Sept. 20, 1993). There, it was specified that the line runs between Consolidated Rail Corporation's milepost 104.1 and milepost 110.05. HCR states that these designations were not utilized by it in connection with HCR's rail operations.

Where, as here, the carrier is abandoning its entire line, the Board does not normally impose labor protection under 49 U.S.C. 10502(g), unless the evidence indicates the existence of: (1) a corporate affiliate that will continue substantially similar rail operations; or (2) a corporate parent that will realize substantial financial benefits over and above relief from the burden of deficit operations by its subsidiary railroad. See Wellsville, Addison & Galetton R. Corp.-Abandonment, 354 I.C.C. 744 (1978); and Northampton and Bath R. Co.-Abandonment, 354 I.C.C. 784 (1978). Because HCR does not appear to have a corporate affiliate or parent that will continue similar operations or that could benefit from the proposed abandonment, employee protection conditions will not be imposed.

Provided no formal expression of intent to file an offer of financial assistance (OFA) has been received, this exemption will be effective on September 21, 2004, unless stayed pending reconsideration. Petitions to stay that do not involve environmental issues,<sup>2</sup> formal expressions of intent to file an OFA under 49 CFR 1152.27(c)(2),<sup>3</sup> and trail use/rail banking requests under 49 CFR 1152.29 must be filed by August 30, 2004. Petitions to reopen or requests for public use conditions under 49 CFR 1152.28 must be

---

<sup>2</sup> The Board will grant a stay if an informed decision on environmental issues (whether raised by a party or by the Board's Section of Environmental Analysis (SEA) in its independent investigation) cannot be made before the exemption's effective date. See Exemption of Out-of-Service Rail Lines, 5 I.C.C.2d 377 (1989). Any request for a stay should be filed as soon as possible so that the Board may take appropriate action before the exemption's effective date.

<sup>3</sup> Each OFA must be accompanied by the filing fee, which currently is set at \$1,100. See 49 CFR 1002.2(f)(25).

notice of consummation by August 20, 2005, and there are no legal or regulatory barriers to consummation, the authority to abandon will automatically expire.

Board decisions and notices are available on our website at  
“WWW.STB.DOT.GOV.”

Decided: August 16, 2004.

By the Board, David M. Konschnik, Director, Office of Proceedings.

Vernon A. Williams

Secretary

IC 32-23-11-6

Formerly cited as IN ST 32-5-12-6

West's Annotated Indiana Code Currentness

Title 32. Property

Article 23. Conveyance of Property Interests Less Than Fee Simple

Chapter 11. Abandoned Railroad Rights-of-way

**32-23-11-6 Requirements for abandonment**

Sec. 6. (a) Except as provided in subsection (b) and in sections 7 and 8 of this chapter, a right-of-way is considered abandoned if any of subdivisions (1) through (3) apply:

(1) Before February 28, 1920, both of the following occurred:

(A) The railroad discontinued use of the right-of-way for railroad purposes.

(B) The rails, switches, ties, and other facilities were removed from the right-of-way.

(2) After February 27, 1920, both of the following occur:

(A) The Interstate Commerce Commission or the United States Surface

Transportation Board issues a certificate of public convenience and necessity relieving the railroad of the railroad's common carrier obligation on the right-of-way.

(B) The earlier of the following occurs:

(i) Rails, switches, ties, and other facilities are removed from the right-of-way, making the right-of-way unusable for continued rail traffic.

(ii) At least ten (10) years have passed from the date on which the Interstate Commerce Commission or the United States Surface Transportation Board issued a certificate of public convenience and necessity relieving the railroad of its common carrier obligation on the right-of-way.

(3) The right-of-way was abandoned under the Regional Rail Reorganization Act of 1973 (45 U.S.C. 701 et seq.).

(b) A right-of-way is not considered abandoned if:

(1) rail service continues on the right-of-way; or

(2) the railroad has entered into an agreement preserving rail service on the right-of-way.

CREDIT(S)

As added by P.L.2-2002, SEC.8.

## HISTORICAL AND STATUTORY NOTES

2002 Main Volume

Formerly:

IC 8-4-35-4

IC 32-5-12-6

P.L.384-1987(ss), SEC.55

P.L.40-1995, SEC.4.

P.L.158-1999, SEC.19.

## LIBRARY REFERENCES

2002 Main Volume

Railroads ⚡82.

WESTLAW Topic No. 320.

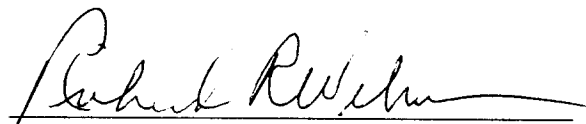
C.J.S. Railroads § 116.

### CERTIFICATE OF SERVICE

I hereby certify that I have this 18<sup>th</sup> day of April, 2006 served a copy of the  
Petition of Honey Creek Railroad, Inc. for Declaratory Order upon the following by first  
class United States Mail, postage prepaid:

William B. Keaton, Esq.  
KEATON AND KEATON, P.C.  
126 West Second Street  
Rushville, IN 46173

John H. Brooke, Esq.  
Brooke-Mawhorr Attorneys at Law  
P.O. Box 1071  
112 E. Gilbert Street  
Muncie, Indiana 47308-1071

  
Richard R. Wilson, Esq.  
Attorney for Honey Creek Railroad, Inc.